82-983

NO. _____

IN THE

Supreme Court Of The United States

October Term, 1982

JAMES E. DUNCAN ..... APPELLANT

VS.

HAROLD PECK ..... APPELLEE

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED - 1(a)

1. Whether Ohio's attachment statute, Ohio Revised Code §2715, which provides for the prejudgment attachment of the property of a nonresident defendant which is present in Ohio without providing for (1) the posting of bond by the Plaintiff; (2) the filing of an affidavit by the Plaintiff alleging personal knowledge of specific facts which form a basis for the prejudgment seizure; (3) judicial supervision of the attachment process; (4) dissolution of the attachment upon the posting of security by the defendant, or (5) an immediate right of hearing to the defendant in which the Plaintiff must prove that the seizure is warranted, is consistent with the due process requirements of the 14th Amendment to the United States Constitution;

2. Whether Service of Process by publication pursuant to 2703.14(G) and Ohio Civil Rule 4.4(A), in a Cincinnati, Ohio newspaper is notice reasonably calculated to reach an out of state defendant in Lexington, Fayette County, Kentucky;

3. Whether the decisions of the United States Supreme Court, interpreting the Constitution of the United States are binding on the state courts of Ohio under Article VI of the United States Constitution;

4. Whether the presence of a stock certificate in Cincinnati, Ohio which is owned by a resident of Lexington, Kentucky, who has no other contacts, ties or

relations with Ohio constitutes sufficient minimum contacts with Ohio, consistent with the 14th Amendment due process clause, to support the exercise of personal jurisdiction by the Ohio State courts over the nonresident owner's stock certificate.

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The opinion of the Supreme Court of Ohio from which this appeal is taken, is attached hereto, and printed in full as Appendix A, hereto.

The unreported opinion of the First Appellate District of Ohio for Cincinnati, Hamilton County, Ohio, No. C-810418, rendered the 7th day of April, 1982, is reprinted as Appendix B, hereto.

JURISDICTION - 1(e)

This action involves an Ohio Plaintiff-Appellee invoking a pre-judgment attachment statute, Ohio Revised Code 2715 and service by publication, pursuant to Ohio Revised Code 2703.14(G) and Ohio Civil Rule 4.4(A), on a nonresident-Appellant (Lexington, Fayette County, Kentucky).

On September 15, 1982, the Supreme Court of Ohio dismissed the Appellant's appeal on the ground that it involved no substantial constitutional question. Notice of Appeal was filed with the Clerk of the Ohio Supreme Court on November 24, 1982.

The date of the judgment or decree sought to be reviewed and the time of its entry is September 15, 1982.

The date of the Order by the Ohio Supreme Court denying Appellant's Petition for Review was entered September 15, 1982.

Notice of Appeal to this Court was filed on November 24, 1982, in the Supreme Court of Ohio. (Appendix C)

Since the constitutionality of Ohio Revised Code 2715 and 2703.14(G) and Ohio Civil Rule 4.4(A) are in question and 28 U.S.C. §2403(b) may be applicable, the Ohio Attorney General has been served with notice of the appeal.

The statutory provision believed to confer on this Court jurisdiction of the appeal is 28 U.S.C. §1257(2), which permits this Court to review, by appeal, the judgment of the highest Court of a state "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity."

Among the cases believed to sustain jurisdiction are *Sniadach* v. *Family Finance*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Pennoyer* v. *Neff*, 95 U.S. 714 (1877); *McDonald* v. *Mabee*, 243 U.S. 90 (1977); *Mullane* v. *Central Hanover Bank & Trust*, 339 U.S. 306 (1950); *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); *International Shoe* v. *Washington*, 326 U.S. 310 (1945); *Marbury* v. *Madison*, 1 Cranch 37, (1803); *Cooper* v. *Aaron*, 358 U.S. (1958).

CONSTITUTIONAL, STATUTORY AND CIVIL RULE PROVISION - 1(f)

Article VI of the Constitution of the United States provides, in relevant part:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any states to the contrary notwithstanding."

Section I of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; ..."

Ohio Revised Code 2715.01 provides, in relevant part:

> "In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the following grounds:
>
> (B) That the defendant is not a resident of this state; ..."

Ohio Revised Code 2715.03 provides that:

"An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in section 2715.01 of the Revised Code, where there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing:
(A) The nature of the plaintiff's claim;
(B) that it is just;
(C) The amount which the Affiant believes the plaintiff ought to recover;
(D) The existence of any one of the grounds for an attachment enumerated in such section.

Such affidavit may be made before any person authorized to administer oaths whether an attorney in the case or not."

Ohio Revised Code 2715.04 provides, in relevant part:

"When the ground of attachment is that the defendant is a foreign corporation, or not a resident of this state, the order of attachment may be issued without a bond. . ."

Ohio Revised Code 2703.14(G) is as follows:

Ohio Revised Code 2703.14 provides, in relevant part, that:

"Service may be made by publication in any of the following cases:

(G) In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence cannot be ascertained; . . .

Ohio Civil Rule 4.4(A) provides:

RULE 4.4 Process: service by publication

(A) Residence unknown. When the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, an affidavit of a party or his counsel must be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant and cannot with reasonable diligence be ascertained.

Upon the filing of the affidavit the clerk shall • *cause* service of notice • to be made by publication in a newspaper of general circulation in the county in which the complaint is filed. If no newspaper is published in that county, then publication shall be in a newspaper published in an adjoining county. The publication • shall contain *the name and address of the court, the case number, the name of the first party on each side, and the name and last known address, if any, of the person or persons whose residence is unknown. The publication shall also contain* a summary statement of the object of the complaint and demand for relief • *and* shall notify the person to be served that he is required to answer

within twenty-eight days after the last publication •. *The publication* shall be published at least once a week for six successive weeks *unless publication for a lesser number of weeks is specifically provided by law.* Service shall be complete at the date of the last publication.

After the last publication, the publisher or his agent shall file with the court an affidavit showing the fact of publication together with a copy of the notice of publication. The affidavit and copy of the notice shall constitute proof of service.

STATEMENT OF THE CASE - 1(g)

On October 25, 1978, Harold Peck, a resident of Cincinnati, Hamilton County, Ohio filed suit in Common Pleas Court, A-7809432, against James E. Duncan, a Lexington, Kentucky resident; Ed Gray, a Georgetown, Kentucky resident; and Duncan-Gray Mining Co., Inc., a Kentucky Corporation. (Appendices D and D-1). The basis of the suit was an alleged oral contract executed with James E. Duncan, Ed Gray and Duncan-Gray Mining Co., Inc. in 1975. Harold Peck in the aforementioned action sought a joint and/or several judgment against James E. Duncan, Ed Gray and Duncan-Gray Mining Co., for $20,000.00 On November 1, 1978, 11,401 shares of stock in Highlands Coal and Chemical Corporation, owned by James E. Duncan, but physically present at the Executive Offices of Highlands Coal and Chemical Corporation, in Cincinnati, Ohio, were seized by an at-

tachment order issued by the Clerk of Courts and executed by the Sheriff of Hamilton County. The attachment order was issued ex parte pursuant to Ohio Revised Code 2715. Service of Process, by certified mail, was sent to James E. Duncan, 1025 Dove Run Road, Lexington, Kentucky 40502; Ed Gray RR #2, Lexington, Kentucky 40505; and Duncan-Gray Mining Co., Inc., 2nd Floor Citizens Plaza Building, Louisville, Kentucky 40202. All of the certified mail was returned. James E. Duncan's was returned as "undeliverable as addressed, no forwarding order on file"; Ed Gray's was returned as "unclaimed"; Duncan-Gray Mining Co., Inc.'s was returned as "not at this address".

An Affidavit for Service by Publication was executed by attorney Robert A. Pitcairn, Jr., pursuant to Ohio Revised Code 2703.14(G) and Ohio Civil Rule 4.4(A). (Appendix D-3) Service in the Cincinnati Court Index was commenced on January 24, 1979. On May 29, 1979 a joint and/or several judgment for $20,000.00 was entered against all three defendants. (Appendices D-4, D-5 and D-6, respectively). Pursuant to an execution, levy and sheriff's sale, James E. Duncan's stock was sold on or about September 10, 1979 to Harold Peck for $15,201.34. Execution Number EX-85687.

On October 12, 1979 the 11,401 shares of James E. Duncan's stock was transferred into the name of Harold Peck. The stock in January of 1981 had a value

between $190,000.00 to $200,000.00 or $17.00 per share.

On July 3, 1980, the Appellant made a motion in the Ohio Court of Common Pleas, pursuant to Ohio Civil Rule 60(b)(5), to set aside the default judgment that had been entered against him on May 29, 1979. The motion to set aside the default judgment was made on the grounds that:

(1) Service of process on a nonresident defendant by publication was ineffective;

(2) The Ohio Court of Common Pleas lacked personal jurisdiction over the defendant; and

(3) The default judgment was void because service of process was ineffective and the court lacked personal jurisdiction over the defendant.

On or about February 18, 1981 the Default Judgment against Duncan-Gray Mining Co. was set aside by agreement and it was dismissed from the state court action. (Appendix E-1)

On or about March 26, 1981 the Default Judgment against Ed Gray was set aside by agreement. (Appendix E)

On May 5, 1981, Judge Paul George of the Court of Common Pleas held a hearing on Appellant's motion to set aside the Default Judgment. At that hearing, the Appellant contended that:

(1) The Default Judgment should be set aside on the ground that the Court lacked the necessary personal jurisdiction over the defendant;

(2) Ohio's attachment statute, Ohio Revised Code 2715, violated the due process requirements of both the United States and Ohio Constitution; and

(3) Service of Process on a resident of Kentucky by publication, Ohio Revised Code 2703.14(G) and Civil Rule 4.4(A), in Ohio was insufficient notice.

At the conclusion of the hearing, Judge George ordered that the Default Judgment be set aside.

Thereafter, the Appellee perfected a timely appeal to the Ohio Court of Appeals, First Appellate District of Ohio. In his brief to the Court of Appeals, Appellee contended that the Default Judgment against the Appellant which had been set aside by Judge George should be reinstated because no factual evidence as to the Appellant's defenses to the claim asserted against him had been presented at the hearing before Judge George.

In his brief to the Ohio Court of Appeals, the Appellant contended that:

1. Ohio Revised Code 2715 did not meet the constitutional standards required by the United States Supreme Court;

2. Ohio Revised Code 2715 had been held, by the Ohio Supreme Court, to be violative of both the United States and Ohio Constitutions;

3. Service of Process by publication in a local newspaper, pursuant to Ohio Revised Code 2703.14(G) and Ohio Civil Rule 4.4(A), on a Kentucky resident, was inadequate;

4. The Ohio Court of Common Pleas lacked jurisdiction; and

5. The trial court did not abuse its discretion in setting aside a void ab initio judgment.

On April 7, 1982, the Ohio Court of Appeals, First Appellate District, entered an Order reversing the Ohio Court of Common Pleas and reinstating the Default Judgment against the Appellant on the ground that the Appellant had failed to introduce any evidence at the hearing on the Motion to set aside the Default Judgment and that he had no meritorious defense or claim to present if the Judgment was set aside.[1]

On March 6, 1982, the Appellant filed a Notice of Appeal to the Ohio Supreme Court. The Appellant contended in his brief to the Ohio Supreme Court that:

1. When a trial court, in the exercise of its discretion, grants a hearing on a motion to set aside a Default Judgment pursuant to Ohio Civil Rule

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[1]The Court of Appeals, First Appellate District, in its opinion, did not comment on the constitutional arguments presented by James E. Duncan when it reinstated the judgment. (Appendix B)

60(b)(5), the Court may consider the entire record of the case, including pleadings, affidavits and all other accompanying materials and apply the applicable law in reaching a decision on the issue of whether a meritorious defense has been made and it is not necessary for the movant to offer testimony or other evidence to substantiate the existence of the meritorious defense when such defense becomes readily apparent from a review of the record of the case and application of the existing law; and

2. A court cannot acquire jurisdiction over the property or the person of a defendant on the basis of service of process by publication, when the service by publication is made in conjunction with a constitutionally defective attachment statute.

On September 15, 1982, the Ohio Supreme Court dismissed the Appellant's Appeal on its own Motion on the ground that it contained no significant constitutional question. On November 24, 1982, the Appellant filed a Notice of Appeal to the Supreme Court of the United States with the Ohio Supreme Court.

REASONS THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL - 1(h)

The questions presented by this Appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution because the Court has previously considered and passed on each question presented. In fact, the law on each issue raised by this Appeal is well-settled by prior decisions of this Court.

ARGUMENT I

WHETHER AN ATTACHMENT STATUTE, OHIO REVISED CODE 2715 WHICH DID NOT PROVIDE FOR A PRESEIZURE OR POST SEIZURE HEARING, NOR THE POSTING OF AN ATTACHMENT BOND OR REQUIRE THE PLAINTIFF TO ESTABLISH A CONVINCING SHOWING OF A NEED FOR THE ATTACHMENT, VIOLATES THE 14th AMENDMENT DUE PROCESS CLAUSE TO THE UNITED STATES CONSTITUTION.

WHETHER DECISIONS OF THE UNITED STATES SUPREME COURT ARE BINDING ON THE STATES THROUGH THE SUPREMACY CLAUSE, ARTICLE VI OF THE UNITED STATES CONSTITUTION.

The Appellee herein utilized Revised Code # 2715 in October of 1978 to attach the Appellant's stock prior to judgment. Service of Process was effectuated by publication. However, the Supreme Court of Ohio in July, 1980 declared O.R.C. 2715 unconstitutional in *Peebles* v. *Clement*, 408 N.E. 2nd 689 (1980). The Ohio Supreme Court adopted the constitutional standards enunciated by the United States Supreme Court in

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W. T. Grant*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

The *Mitchell, Fuentes, Sniadach* and *North Georgia Finishing* cases were decided between 1969 and 1975, thereby theoretically, striking Ohio Revised Code Chapter 2715 at that time, because decisions of the United States Supreme Court are binding on all of the states when decided. Constitution of the United States, Article VI; *Marbury* v. *Madison*, 1 Cranch 37, 2 L.Ed. 60 (1803); *Cooper* v. *Aaron*, 358 U.S. 1, (1958).

The attachment which led to the *Peebles, supra* decision occurred on February 25, 1977. The attachment at issue in the instant controversy occurred on November 1, 1978. In *Peebles, supra*, at 317, the Ohio Supreme Court wrote: "however, if the attachment was constitutionally invalid at the time it was made because appellees were not afforded sufficient procedural safeguards, it is equally invalid one year later and can be dismissed by a court at that time."

Through this language the Court had said that the *Peebles* attachment was constitutionally invalid when made on February 5, 1977. It follows that the attachment in the instant case was constitutionally invalid when made on November 1, 1978. A statute declared unconstitutional is void from the date of enactment. *Hogg* v. *Zanesville Canal and Manufactur-*

ing Co., 5 Ohio 410 (1832). It is a mere nullity. *Cincinnati, Wilmington and Zanesville Railroad Co.* v. *Clinton County*, 1 Ohio St. 77 (1852).

The procedural safeguards afforded a defendant in a prejudgment attachment are the following, as explained by the United States Supreme Court in *Mitchell* and *Fuentes:*

> (1) The replevin order must be granted by a judge, rather than a clerk.
>
> (2) The applicant must make a convincing showing of need for prejudgment seizure, rather than merely state that it was necessary. Therefore a verified affidavit must be made with the grounds for attachment.
>
> (3) There must either be an immediate pre-seizure or at the least post-seizure hearing on the attachment and the posting of a bond.
>
> (4) There is need for documentary proof, rather than merely just a "fault" standard.

Since O.R.C. 2715 did not require the aforementioned constitutional safeguards, the Ohio Supreme Court adopted the standards at its first chance in *Peebles* v. *Clements, supra.* Thus the attachment procedures utilized by the Appellee were in violation of the Appellant's Fourteenth Amendment Due Process guarantees and the Ohio Constitution due process guarantees.

Ohio Revised Code 2715 did not meet the constitutional standards as set forth by the United States Supreme Court cases or in *Peebles.* In the Cincinnati action against James E. Duncan, a prejudgment seizure bond *was not posted* and the attachment was issued by a *clerk.* Both the United States Supreme Court and the Ohio Supreme Court stated unequivocably that *judicial supervision* of prejudgment seizures is a mandatory requirement for such action. In addition, the attachment against Duncan was issued *ex parte* and Duncan had no opportunity for a post seizure hearing to dissolve the attachment because his mail was returned as "undeliverable as addressed, no forwarding order on file."

In *Lincoln Tavern, Inc.* v. *Snader,* 133 N.E. 2nd 606 (1956) the Ohio Supreme Court stated that strict compliance with the attachment statute was required for the entry of a valid judgment; if the attachment statute was not strictly followed then the judgment was void ab initio rather than merely voidable.

In *Lincoln, supra,* the Ohio Court allowed recovery against a third party at the judicial sale. The Court reasoned that if the attachment statute was not strictly followed then the judgment execution and sheriff sale were both void.

It is obvious that O.R.C. 2715 was constitutionally defective under the constitutional standards set forth in *Sniadach, Fuentes, Mitchell* and *Di-Chem, supra,* and the judgment entry, execution and sheriff sale were also void ab initio.

ARGUMENT II

WHETHER SERVICE OF PROCESS BY PUBLICATION, ON A NONRESIDENT DEFENDANT, PURSUANT TO OHIO REVISED CODE 2703.14(G) and OHIO CIVIL RULE 4.4(A), IS NOTICE REASONABLY CALCULATED TO REACH A NONRESIDENT DEFENDANT, AS REQUIRED BY THE 14TH AMENDMENT DUE PROCESS CLAUSE TO THE UNITED STATES CONSTITUTION.

It has long been established that constructive service on a nonresident by publication furnishes no legal basis for a judgment in personam. *Pennoyer* v. *Neff*, 95 US 714, (1877), *Oil Well Supply Co.* v. *Koen*, 60 NE 603 (1901).

The Court stated in *Pennoyer, supra*, as follows:

> "If, without personal service, judgments in personam, obtained ex parte against nonresidents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would thus be obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished."

James E. Duncan was a real estate owner in Lexington, Fayette County, Kentucky, at 1235 Roseberg Court, and had been a homeowner since March, 1976.

There has been no proof that there was any attempt to personally serve James E. Duncan. Peck and Pitcairn continually sent mail to an incorrect business address without "Suite Number 109" on the envelope, but never attempted to serve Duncan at his home at 1235 Roseberg Court. The law was never intended to be used in this manner.

The United States Supreme Court has also held that a personal judgment based on service by publication is absolutely void, even though the defendant is technically domiciled within the state, if he is absent therefrom without the intention of returning. *McDonald* v. *Mabee*, 243 US 90, (1917). The Supreme Court of the United States addresses the notice problems by basically saying "tell 'em like you want 'em to know". In the landmark decision of *Mullane* v. *Central Hanover Bank & Trust*, 339 US 306 (1950), the Supreme Court said, as to notice for those whose addresses are known or are reasonably ascertainable:

> "An essential and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection . . . process which is a mere gesture is not due process."

The last phrase of the above is so aptly put — "process which is a mere gesture is not due process." Certainly that would apply to James E. Duncan. Peck

and Pitcairn's mere gesture of sending a summons to an address with the knowledge that the mail would be returned as undeliverable and consequently subject Duncan to service by publication was a "mere gesture".

The Supreme Court's language in *Mullane* would apply regardless of whether the proceeding was classified as quasi-in-rem or as in personam. In line with this is *Oil Well Supply* v. *Koen, supra,* which states that "service by publication in an action *in personam* against a nonresident of the state is utterly void and personal judgment against the non-resident based on service by publication is invalid".

In addition, as to whether or not the Court had personal jurisdiction, 32 Ohio Jur 2d Judgments 47, the Ohio Courts have said:

> "A judgment cannot be lawfully rendered in a proceeding in which the court has no jurisdiction because of lack of due notice to a person to whom such notice is required by statute to be given, and so vitally important is the requirement of due notice to the defendant that all proceedings of courts without it, in passing on the merits of the case, are held to be not merely erroneous, but absolutely *void.*" (Emphasis added).

A void judgment is defined in 32 Ohio Jur 2d Judgments 48 as "a mere nullity which is not respected as the act of a court . . . the judgment has no legal or binding force or efficacy." Further, a void

judgment "may be attached and impeached either directly or collaterally." The Appellant was not given notice and discovered later that his stock had been attached and sold to cover a Twenty Thousand and 00/100 ($20,000.00) Dollar personal default judgment. Again, 32 Ohio Jur 2d 48 states that:

> ". . . [F]ull faith and credit clause of the Constitution does not sanction or comprehend a personal judgment against a nonresident based upon service by publication or constructive service."

Utilizing the concept of "void judgment", *The Lincoln Tavern, supra* stated that it is a nullity and that "any proceedings taken thereunder should be vacated and held for naught". The attached property, as in the case at bar, must be returned:

> "Since the sale of the defendant's property was based on the judgment and the judgment is void on the face of the record, the sale made thereunder is also void."

ARGUMENT III

WHETHER THE PHYSICAL PRESENCE OF A STOCK CERTIFICATE, WITHOUT OTHER CONTACTS, TIES OR RELATIONS WITH THE FORUM, IS SUFFICIENT TO ESTABLISH JURISDICTION CONSISTENT WITH THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The suit in Cincinnati against James E. Duncan by the Appellee herein was a personal action based on an *alleged oral contract* claim for the sum of Twenty Thousand and 00/100 ($20,000.00) Dollars. The standards enunciated in *Mitchell, Fuentes, Sniadach* and *North Georgia Finishing,* are the constitutional standards for quasi-in-rem proceedings where the argument is between two named parties for a "*thing*". The Appellee herein, Harold Peck, has never had a *proprietary interest* in Mr. Duncan's stock. The suit in Cincinnati involved a finder's fee for arranging financing. Since this was a personal jurisdiction-type of action, the Appellee utilized quasi-in-rem jurisdiction to hold "hostage" the property of the Appellant which gave him an ultimatum to either fight or lose the property in a jurisdiction in which "minimum contacts" were lacking. In 1977, the United States Supreme Court denied the use of such jurisdiction to coerce *in personam* appearances, *when the claim was unrelated to the rights of the parties in the property.* Since Peck's claim was for *money* in a *personal* action, the use of an attachment against personal property unrelated to the cause of action, as the basis of

jurisdiction, was a violation of the Fourteenth Amendment Due Process Clause.

The two cases denying this use of *quasi-in-rem* jurisdiction are *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) and *U.S. Industries* v. *Gregg*, 540 F.2d 142 (3d Cir. 1976). *Shaffer* was a stockholder's derivative suit where none of the Defendants had "minimum contacts" with the Delaware forum, while *Gregg* was a suit by a Delaware corporation against a Florida resident who had no "minimum contacts" with the forum either. The Supreme Court held that a state cannot attempt to coerce an *in personam* appearance by the seizure of valuable assets, such as stock in the case at bar, where the assets are unrelated to the cause of action.

Now, all jurisdictional exercises must meet the *International Shoe* v. *Washington*, 326 U.S. 310 (1945), test of "minimum contacts". In *World-Wide Volkswagen* v. *Woodsen*, 444 U.S. 286 (1980), the Supreme Court said that the Due Process Clause does not "contemplate that a state may make a binding judgment in personam against an individual and/or corporate defendant with which the state has no contact, ties or relations". The Appellant herein had only a stock certificate in Cincinnati, and that certificate was unrelated to Peck's money claim of Twenty Thousand and 00/100 ($20,000.00) Dollars. Appellant had no other contact with the Ohio forum, thereby rendering the judgment void.

Additionally, in *Kulko* v. *Superior Court of Los Angeles*, 436 U.S. 84 (1978), the Supreme Court has added to the "minimum contacts" requirement the test of "purposeful availment". The *presence of a stock certificate* does not meet the test of "purposeful availment".

Therefore, the Appellant contends that the Judgment was void because of lack of jurisdiction, since his only contact with the Appellee and the Ohio forum was the location of his stock certificates in a vault in Cincinnati, which is not enough to constitutionally allow jurisdiction, under the Fourteenth Amendment Due Process Clause.

John Robinson's Affidavit (Paragraph 4) states that Harold Peck had nothing to do with the formation of Duncan-Gray Mining Co., Inc. This supports the absolute denials by Duncan and Gray. More significant is that Harold Peck never had a *proprietary interest* in Duncan's stock. Peck has never established a creditor-debtor relationship with any of the original defendants.

The only contact with the Cincinnati forum was Duncan's stock certificate which is not sufficient to support personal or quasi-in-rem jurisdiction. In support of the aforementioned contention of no contacts with the Cincinnati forum is an examination of the original Complaint filed October 25, 1978. That Complaint does not reflect any contact, tie or relation with Cincinnati, Hamilton County, Ohio. (Appendix D-1)

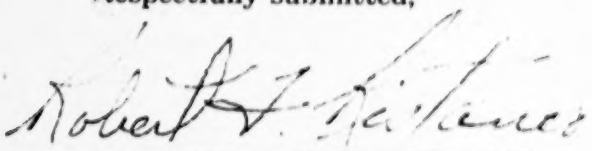
Assuming that Ohio is one of the fifty states in our federal system of government, the overriding issue presented by this case is whether the Constitution of the United States, as interpreted by decisions of the United States Supreme Court, is the supreme law of the land and binding upon the judges in every state, as plainly set forth in Article VI, Section 2 of the Constitution of the United States. Refusal by the Court to consider this case would have monumental ramifications in that, as a practical matter, such refusal would be signal to the state courts that they are free to ignore the United States Constitution if they so choose. Such a turn of events would seriously undermine and violate Article VI, Section 2 of the Constitution of the United States.

If such a situation were to arise, Article VI would be meaningless and the decisions of this Court would, as a practical matter, be advisory only. In essence, refusal to consider this matter could result in the demise of our federal government with each state free to, among other things, interfere with interstate commerce to any degree and in any manner and to limit or abolish such basic constitutional guarantees as equal protection and due process of law.

For the reasons set out hereinabove, it is herein submitted that Ohio Revised Code 2715 and 2703.14(G) and Civil Rule 4.4(A) are denials of due process of law as guaranteed by the 14th Amendment to the United States Constitution, and this Court, it is

respectfully requested, ought to note probable jurisdiction.

Respectfully submitted,



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APPENDIX A

SC-10A 82-1-1 Ramsey Business, Publishing, Sycamore, Ohio

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 82 *TERM*

To wit: SEP 15 1982

Harold Peck,

Appellee,

vs.

Duncan Gray Mining Co., et al.,

Defendants;

James E. Duncan

Appellant.

No. 82-842

APPEAL FROM THE COURT OF APPEALS

for HAMILTON *County*

This cause, here on appeal as of right from the Court of Appeals for HAMILTON *County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION ONLY NOT FOR FILING

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

..... Clerk

..... Deputy

APPENDIX A-1

80-121 Baggett Brothers, Publishers, Springfield, Ohio

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19...82 TERM
SEP 15 1982
To wit:.....

Harold Peck,
Appellee,
vs.
Duncan Gray Mining Co., et al.,
Defendants;
James E. Duncan,
Appellant.

No. 82-842

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for HAMILTON *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

FOR YOUR INFORMATION ONLY NOT FOR FILING

COSTS:

Motion Fee, $20.00, paid by Dole, Rueger & Matthews

.....

.....

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of.....19.....

.....*Clerk*

.....*Deputy*

APPENDIX B

FILED
COURT OF APPEALS
APR 7 1982
CLERK OF COURTS

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-810498

HAROLD PECK, Plaintiff-Appellant,

vs.

DUNCAN GRAY MINING CO. and
EDWARD GRAY, Defendants,
and
JAMES E. DUNCAN, Defendant-Appellee.

MEMORANDUM DECISION AND JUDGMENT ENTRY.

Mr. William S. Wyler, Suite 700, 105 East Fourth Street, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Mr. Wm. Stewart Mathews, II, 1300 American Building, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal the transcript of the docket, journal entries and

original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

Now, therefore, the assignments of error having been fully considered, are accordingly passed upon in conformity with App. R. 12(A) as follows:

On May 29, 1979, default judgment was entered against defendant-appellee James Duncan. On July 3, 1980, defendant filed a motion to set aside this judgment pursuant to Civ. R. 60(B)(5). This motion was subsequently granted. Plaintiff-appellant timely appeals this decision.

Plaintiff brings two assignments of error on this appeal. Both assignments advance, as error, the action of the court below in setting aside the default judgment in question. The assignments of error have merit.

To prevail on a motion under Civ. R. 60(B), the movant must demonstrate that he has a meritorious defense or claim to present if relief is granted, that he is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5) and that the motion is made within a reasonable time where relief is sought, as here, under Civ. R. 60(B)(5). *GTE Automatic Electric* v. *ARC Industries* (1976), 47 Ohio St. 2d 146, 351 N.E.2d 113. If a trial court exercises its discretion and grants a hearing on the motion, as did the court below, an appeal taken from the court's order will not be decided upon the material submitted with the motion

but upon whether the evidence introduced at the hearing demonstrates that the moving party has met the requirements of *GTE, supra. Bates & Springer, Inc.* v. *Stallworth* (8th Dist. 1978), 56 Ohio App. 2d 223, 382 N.E.2d 1179.

Careful review of the record before this Court reveals that defendant failed to introduce any evidence at the hearing on the motion that he has a meritorious defense or claim to present if the relief requested is granted. The assignments of error are well taken.

For this reason, it is the Order of this Court that the judgment or final order herein appealed from be, and the same is hereby reversed and the default judgment in favor of plaintiff is hereby reinstated.

It is further ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellee, by his counsel, excepts.

SHANNON, P. J., KEEFE and KLUSMEIER, JJ.

* * * * * * *

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF OHIO

JAMES E. DUNCAN — APPELLANT

SUPREME COURT NO. 82-842
V. COURT OF APPEALS NO. C-810498
COMMON PLEAS NO. A7809432
EX. NO. 85687

HAROLD PECK — APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that James E. Duncan, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio affirming by dismissal of appeal issued September 15, 1982 the judgment of the First Appellant District, Court of Appeals, Hamilton County, Ohio upholding the validity of state statutes, to-wit: Ohio Revised Code 2715 and 2703.14(G) and Ohio Civil Rule 4.4A, the validity of such statutes and Civil Rule having been drawn in question as being repugnant to the due process clause of the 14th Amendment to the Constitution of the

United States of America and such judgment herein appealed from being in favor of validity.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in such transcript so much of the record as may hereafter be requested by Appellant under Rule 13.2 of the Rules of the Supreme Court of the United States.

III. The constitutionality of O.R.C. 2715 and 2703.14(G) and Ohio Civil Rule 4.4A are being questioned and 28 U.S.C. §2403(b) may be applicable and therefore service of this Notice of Appeal shall be served on the Attorney General of Ohio pursuant to Supreme Court Rule 28.4(c).

IV. The following questions are presented by this appeal:

(a) Whether an attachment statute [O.R.C. 2715] which did not provide for a pre-seizure or post seizure hearing, nor judicial supervision of the attachment procedure, nor the posting of an attachment bond nor did it require the Plaintiff to establish a convincing showing of a need for the attachment, violate the 14th Amendment due process clause to the United States Constitution;

(b) Whether service of process by publication, on an out of state resident-Defendant, O.R.C. 2703.14(G) and Ohio Civil Rule 4.4A, is notice reasonably

calculated to reach the out of state resident-Defendant and consistent with the 14th Amendment due process clause to the United States Constitution;

(c) Whether decisions of the United States Supreme Court are binding on the states through the Supremacy Clause, Article VI of the United States Constitution;

(d) Whether the physical presence of a stock certificate, without other contacts, ties or relations with the forum, is sufficient to establish jurisdiction consistent with the 14th Amendment due process clause of the United States Constitution.

/s/ Robert F. Ristaneo
ROBERT F. RISTANEO
ATTORNEY AT LAW
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2465

PROOF OF SERVICE

I, Robert F. Ristaneo, attorney of record for James E. Duncan, Appellant herein, deposes and says, that on the 24th day of November, 1982, I mailed by first class mail a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Harold Peck by mailing same to his attorney of record Hon. William S. Wyler, French, Marks, Short, Weiner and Valleau, Suite 700, 105

East Fourth Street, Cincinnati, Ohio 45202, that 28 U.S.C. §2403(b) may be applicable and therefore a true and accurate copy has been served on the Attorney General of Ohio, 330 E. Broad Street, State Office Tower, 17th Floor, Columbus, Ohio 43215, thereby serving all parties required by Rule 28 and 33 of the Rules of the Supreme Court of the United States.

/s/ Robert F. Ristaneo
ROBERT F. RISTANEO
ATTORNEY AT LAW
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2465

ATTORNEY FOR APPELLANT,
JAMES E. DUNCAN

STATE OF KENTUCKY)
SS
COUNTY OF FAYETTE)

The foregoing was subscribed and sworn to before me by Robert F. Ristaneo, on this the 24th day of November, 1982.

My Commission Expires June 10, 1985.

/s/ Ann P. Gott
NOTARY PUBLIC, STATE AT LARGE,
KENTUCKY

(Notary Seal)

* * * * * * *

APPENDIX D

THE STATE OF OHIO, HAMILTON COUNTY } ss

Common Pleas Court

I, ROBERT D. JENNINGS, Clerk of the Court of Common Pleas, within and for the County and State aforesaid, do hereby certify the within and foregoing to be a true and correct Transcript of the Complaint For Money

Filed October 25, 1978

in the Case No. A7809432, wherein HAROLD PECK PLAINTIFF

DUNCAN-GRAY MINING CO. ET.AL. DEFENDANTS

as appears from the files and records now in my office.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the Seal of said Court, at Cincinnati, this 23rd. day of June, A. D. 19 80

ROBERT D. JENNINGS,
Clerk of the Common Pleas Court of Hamilton County, Ohio

By Geraldine W. Myers Deputy

APPENDIX D-1

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

NO. 7809432

HAROLD PECK
3245 North Whitetree Circle
Cincinnati, Ohio 45236 — Plaintiff

v.

DUNCAN-GRAY MINING CO.
Second Floor, Citizens Plaza
Louisville, Kentucky 40202

JAMES E. DUNCAN
1025 Dove Run Road
Lexington, Kentucky 40502

and

EDWARD GRAY
Rural Route #2
Lexington, Kentucky 40505 — Defendants

COMPLAINT FOR MONEY

1. In late 1975 plaintiff entered into an oral contract with defendants and each of them under the terms of which plaintiff was to attempt to arrange financing for defendants.

2. In the event plaintiff arranged financing for the purposes and in the amount agreed to by plaintiff and defendants, plaintiff would be compensated by

receiving 33-1/3% of the stock of the Duncan-Gray Mining Co..

3. Plaintiff arranged financing for defendants pursuant to the agreement, which was accepted by defendants, however, defendants and each of them have failed to pay plaintiff the amount due and owing although demand has been duly made.

4. The fair and reasonable value of the stock due and owing to plaintiff was $20,000.00 as of February 1, 1976, the date it became due.

5. Plaintiff has duly demanded payment and said demands have been refused and ignored.

WHEREFORE, plaintiff demands judgment jointly and/or severally against defendants in the amount of $20,000.00 plus interest at the maximum legal rate from February 1, 1976, together with costs.

/s/ Robert A. Pitcairn, Jr.
Robert A. Pitcairn, Jr.
Trial Attorney for Plaintiff
1504 First National Bank Bldg.
Cincinnati, Ohio 45202
Telephone: (513) 381-8616

* * * * * * *

APPENDIX D-2

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. 7809432

HAROLD PECK — Plaintiff

v.

DUNCAN-GRAY MINING CO., et al. — Defendants

STATE OF OHIO :
: SS:
COUNTY OF HAMILTON:

AFFIDAVIT OF HAROLD PECK

I, Harold Peck, being first duly cautioned and sworn state and aver the following based on my personal knowledge, information, and belief.

1. I am the plaintiff in the above captioned action and make this Affidavit for the purpose of obtaining an Order of Attachment against property of the defendants that is being held by the Highlands Coal & Chemical Corp., Suite 809, 414 Walnut Street, Cincinnati, Ohio 45202.

2. This Affidavit is made pursuant to §§ 2715.01 & 2715.03 of the Ohio Revised Code.

3. The nature of my claim against defendants is that they are obligated to pay to me $20,000.00 for work performed pursuant to an oral contract to ar-

range financing. I was supposed to be paid in stock and defendants refused to pay.

4. The value of the stock involved is approximately $20,000.00.

5. The nature of my claim is breach of contract.

6. My claim is just.

7. The ground for the attachment is that the individual Defendants are not residents of the State of Ohio and the corporate Defendant is a foreign corporation and not exempt from attachment.

Affiant further sayeth naught.

/s/ Harold Peck
Harold Peck

Sworn to and subscribed before me this 21st day of October, 1978.

/s/ Robert A. Pitcairn, Jr.
Notary Public

Robert A. Pitcairn, Jr. Attorney at Law
Notary Public - State of Ohio
My Commission has no Expiration date
Section 14703 R. C.

* * * * * * *

APPENDIX D-3

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A7809432

HAROLD PECK — Plaintiff

v.

DUNCAN-GRAY MINING CO., et al. — Defendants

STATE OF OHIO :
: SS:
COUNTY OF HAMILTON:

AFFIDAVIT FOR SERVICE BY PUBLICATION

I, Robert A. Pitcairn, Jr., being first duly cautioned and sworn hereby state and depose the following:

1. I am an attorney licensed to practice law in the State of Ohio and am counsel for Harold Peck in the above captioned case.

2. On behalf of Mr. Peck I caused a complaint for the recovery of money to be filed against Duncan-Gray Mining Co. whose last known address was 2nd Floor, Citizens Plaza, Louisville, Kentucky 40202, James E. Duncan whose last known address was 1025 Dove Run Road, Lexington, Kentucky 40502 and Edward Gray whose last known address was Rural

Route 2, Lexington, Kentucky 40505, in the Hamilton County Court of Common Pleas on October 25, 1978. Said case has been assigned the number contained in the caption of this affidavit.

3. On October 27th I caused to be filed on behalf of Mr. Peck a provisional remedy by way of attachment to take property of the defendants that was located in Cincinnati, Ohio pursuant to the attachment statutes of the Ohio Revised Code.

4. On November 1, 1978 the sheriff of Hamilton County, Ohio attached 11,401 shares of Safe Tec, Inc. common stock, being enough of defendants' property to satisfy the amount claimed in the plaintiff's complaint, and duly filed his return on November 13, 1978.

5. When the complaint in this action was filed the Clerk of Courts of Hamilton County, Ohio attempted to serve each defendant by certified mail at the aforesaid last known addresses.

6. On November 6, 1978 I received notice from the Clerk of Courts that certified mail service addressed to defendants James E. Duncan and Edward Gray had been returned "Addressee Unknown".

7. On November 9, 1978 I received notice that certified mail service addressed to Duncan-Gray Mining Co. had been returned "Addressee Unknown".

8. After receiving the above mentioned notifications from the Clerk of Courts I caused an investiga-

tion to be made concerning the possible whereabouts of the three defendants by a telephone inquiry, checking with the United States Post Office and various phone calls with alleged friends and associates of said defendants. In each case I was informed that the residence of each defendant was unknown.

9. My investigation also revealed and reconfirmed the fact that neither of the individual defendants is a resident of the State of Ohio and that th corporate defendant is a foreign corporation.

10. Service of summons cannot be made on any of the defendants because the residence of each defendant is unknown to the undersigned and cannot with reasonable diligence be ascertained.

11. This affidavit for publication is made pursuant to Rule 4.4(A) of the Ohio Rules of Civil Procedure and § 2703.14(G) of the Ohio Revised Code.

Affiant further sayeth naught.

/s/ Robert A. Pitcairn, Jr.
Robert A. Pitcairn, Jr.

Sworn to and subscribed before me this 17th day of January, 1979.

/s/ James J. Chalfie
Notary Public

JAMES J. CHALFIE, Attorney at Law
NOTARY PUBLIC • STATE OF OHIO
My Commission has no expiration
date. Section 147.03 R. C.

(Notary Seal)

* * * * * * *

APPENDIX D-4

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. 7809432

HAROLD PECK — Plaintiff

v.

DUNCAN-GRAY MINING CO., et al. — Defendants

MOTION FOR DEFAULT JUDGMENT

Plaintiff moves the court for a judgment of default in the above entitled action against the defendant herein.

The defendants were served with notice of this suit by publication pursuant to Rule 4.4(A) of the Ohio Rules of Civil Procedure, an Affidavit in Proof of Publication was entered in the records of the Clerk of Courts of Common Pleas, Hamilton County, Ohio, on February 28, 1979, more than 28 days have passed since that date, and the defendants have failed to answer or otherwise defend as to the plaintiff's Complaint. Further, defendants have not served a copy of any answer or other defense which they might have had, nor have the defendants made any appearance herein nor have any proceedings been taken by the defendants herein.

WHEREFORE, plaintiff moves that this court make an enter judgment jointly and/or severally

against the defendants in the amount of $20,000.00 plus interest at the maximum legal rate from February 1, 1976 together with costs.

/s/ Robert A. Pitcairn, Jr.
Robert A. Pitcairn, Jr.
Trial Attorney for Plaintiff
1504 First National Bank Bldg.
Cincinnati, Ohio 45202
Telephone: (513) 381-8616

* * * * * * *

APPENDIX D-5

FILED
APR 26 PM 4:09

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A7809432

HAROLD PECK — Plaintiff

v.

DUNCAN-GRAY MINING CO.,

JAMES E. DUNCAN,

and

EDWARD GRAY — Defendants

REPORT OF REFEREE

The plaintiff having commenced an action for money against defendants by a complaint filed on October 25, 1978 and having properly obtained service of process on each defendant pursuant to the appropriate provisions of the Ohio Rules of Civil Procedure and each defendant having failed to plead or otherwise appear within the allowable time. And further upon the motion of plaintiff for a default judgment, with proper notice under the Rules of the Hamilton County, Ohio, Court of Common Pleas and the affidavit of plaintiff that the individual defendants are not in the military service. And finally upon proof satisfactory to the Referee as to the sufficiency

of service of process, notification of the hearing on the motion for a default judgment, and the sufficiency of the allegations contained in the complaint, it is hereby ordered and recommended to the Court that plaintiff recover against the defendants, jointly and severally, the sum of $20,000.00 plus interest at the rate of 6% per annum from February 1, 1976 until paid and the costs of this action.

/s/ XXXXXXXXXXX
Referee

REFEREE
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

* * * * * * *

APPENDIX D-6

ENTERED
MAY 29 1976
IMAGE 386

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A7809432

HAROLD PECK — Plaintiff

v.

DUNCAN-GRAY MINING CO.,

JAMES E. DUNCAN

and

EDWARD GRAY — Defendants

JUDGMENT ENTRY

The plaintiff having commenced an action for money against defendants by a complaint filed on October 25, 1978 and having properly obtained service of process on each defendant pursuant to the appropriate provisions of the Ohio Rules of Civil Procedure and each defendant having failed to plead or otherwise appear within the allowable time. And further upon the motion of plaintiff for default judgment with proper notice under the rules of the Hamilton County, Ohio, Court of Common Pleas and the affidavit of plaintiff that the individual defendants are not in the military service. And further upon reference

to the Referee of this Court and proof satisfactory to said Referee as to the sufficiency of service of process, notification of the hearing on the motion for default judgment, and the sufficiency of the allegations contained in the complaint. And finally the Referee of this Court having made his report and filed the same on April 26, 1979 and no objections to said report having been filed, and it appearing to the Court that the report of the Referee should and hereby is affirmed in all respects:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff recover against the defendants, jointly and severally, the sum of $20,000.00 plus interest at the of 6% per annum from February 1, 1976 until paid together with the costs of this action.

Frederick J. Cartolano, Judge
Court of Common Pleas

/s/ Robert A. Pitcairn, Jr.
Trial Attorney For Plaintiff

/s/ XXXXXXXXXXXX
Referee

ENTERED
MAY 29 1979
IMAGE 387

* * * * * * *

APPENDIX E

ENTERED
MAR 26 1981
IMAGE 364

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-7809432

HAROLD PECK — Plaintiff

vs.

DUNCAN-GRAY MINING CO., et al — Defendants

ENTRY SETTING ASIDE DEFAULT JUDGMENT AGAINST EDWARD GRAY

By and between counsel for plaintiff and counsel for defendant, Edward Gray, it is hereby agreed and stipulated that the default judgment, previously entered in the within action against said defendant, Edward Gray, is hereby set aside and held for naught and the Clerk is instructed to cancel same. It is further agreed and stipulated that said defendant, Edward Gray, is hereby granted 30 days from the date this entry is journalized within which to answer, move or otherwise plead to the complaint in the within action.

/s/ Paul J. George

/s/ William S. Wyler
William S. Wyler
Attorney for Plaintiff

/s/ James M. Moore
James M. Moore
Attorney for Defendant, Edward Gray

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to Wm. Stewart Mathews, II, Attorney at Law, 1300 American Building, Cincinnati, Ohio, 45202, and to Robert F. Ristaneo, Attorney at Law, 504 Security Trust Building, Lexington, Kentucky 40507, by regular U.S. mail, this 26th day of March, 1981.

/s/ James M. Moore
James M. Moore
Attorney at Law

* * * * * * *

APPENDIX E-1

ENTERED
FEB 13 1981
IMAGE 359

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-7809432

HAROLD PECK — Plaintiff

vs.

DUNCAN-GRAY MINING CO.

JAMES E. DUNCAN

and

EDWARD GRAY — Defendants

(Judge Morrissey)

ENTRY SETTING ASIDE DEFAULT JUDGMENT AGAINST DUNCAN-GRAY MINING COMPANY

By and between counsel for plaintiff and counsel for defendant, Duncan-Gray Mining Co., sometimes referred to herein as Duncan-Gray Mining Co., Inc., it is hereby agreed and stipulated that the default judgment, previously entered in the within action against said defendant, Duncan-Gray Mining Co., is hereby set aside and held for naught and the Clerk is instructed to cancel same.

/s/ Judge Morrissey

/s/ William S. Wyler
William S. Wyler
Attorney for Plaintiff

/s/ James M. Moore
James M. Moore
Attorney for Defendant, Duncan Gray Mining Co.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to W. Stewart Mathews, II, Attorney at Law, 1300 American Building, Cincinnati, Ohio, 45202, and to Robert F. Ristaneo, Attorney at Law, 504 Security Trust Building, Lexington, Kentucky 40507, by regular U.S. mail, this 13 day of February, 1981.

/s/ James M. Moore
James M. Moore
Attorney at Law

* * * * * * * *

No. 82-983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES E. DUNCAN, APPELLANT

v.

HAROLD PECK, APPELLEE

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF OHIO

MOTION TO DISMISS

WILLIAM S. WYLER, ESQ.
French, Marks, Short, Weiner
& Valleau
Suite 700
105 East Fourth Street
Cincinnati, Ohio 45202
(513) 621-2260
Counsel for Appellee

PRINTED BY ARNOLD'S QUICKPRINT, 120 EAST FOURTH STREET, CINCINNATI, OHIO 45202

QUESTIONS PRESENTED FOR REVIEW

May Appellant proceed on the within Appeal of this matter, to this Honorable Court, when a Petition on Writ of Certiorari would be the correct method for bringing this matter before the Court.

Is the holding, which found Ohio Revised Code Section 2715 et seq, Ohio's former Pre-judgment Attachment Statute unconstitutional, to be given retrospective application.

May Appellant, who has filed a Motion to Set Aside a Default Judgment under Ohio Civil Procedure Rule 60 (B), ignore the proper method for presenting Rule 60 (B) motions because Appellant claims a "Constitutional Question."

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTORY AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES
MOTION TO DISMISS

STATEMENT OF THE CASE

This matter was originally heard on Appellant's Motion to Set Aside a Judgment under Rule 60 (B) of the Ohio Rules of Civil Procedure. Appellant's Motion is contained herein as Appendix 2. Attached as Appendix 1 is Ohio Civil Rule 60 (B).

No issues with regard to the validity of any statutes were raised in Appellant's Motion or Memorandum, which is attached thereto.

Ultimately, the lower court set aside the judgment, which action was appealed to the Court of Appeals for the First Appellate District, Hamilton County, Ohio. Upon briefs and oral arguments the Court of Appeals for the First Appellate District rendered the opinion which is in Appellant's Jurisdictional Statement, as Appendix 3, reversing the Common Pleas Court.

Appellant filed a Motion In Support of Jurisdiction to the Supreme Court of Ohio. The Court denied Appellant's Motion.

Appellant has now filed his Notice of Appeal with this Honorable Court.

STATEMENT OF FACTS

The origin of this matter was the commencement of a suit in Hamilton County Common Pleas Court on October 25, 1978, in which Harold Peck was Plaintiff and James E. Duncan was one of the Defendants. The Complaint was for money damages in the amount of $20,000.00.

On October 27, 1978 the Hamilton County Sheriff attached certain shares of stock belonging to James E. Duncan, which shares were later sold according to law. This prejudgment attachment was made under Ohio Revised Code Section 2715, which was in full force and effect at the time of the attachment and subsequent judgment.

(Later, *Peebles v. Clement* 63 OS 2d 314 (1980) found ORC Section 2715 et seq. to be invalid based upon decisions of this Court.)

Service of the complaint was in accord with the Ohio Rules of Civil Procedure. On May 29, 1979 the Court granted Harold Peck a default judgment. The shares were sold after judgment was granted.

A year later, Mr. Duncan filed a complaint in United States District Court claiming that the procedures followed in the Ohio courts gave rise to a Title 42 USC 1983 claim. That cause is presently before the United States Court of Appeals for the Sixth Circuit. Mr. Duncan is appealing the Summary Judgment granted to Mr. Peck in the District Court.

After filing the complaint in U.S. District Court, Mr. Duncan filed a Motion to Set Aside the Default Judgment in the Court of Common Pleas, Hamilton County, Ohio, under Ohio Rule 60 (B), [Appendix 2]. It is the action taken on the 60 (B) Motion which is presently before this Court.

On May 5, 1981 the matter was presented to the Common Pleas Court. After the hearing, at which no witnesses were called, the Court found that the judgment against Mr. Duncan should be set aside.

Thereafter, Mr. Peck appealed the decision to the Court of Appeals for the First Appellate District of Ohio. In that Court, for the first time, Mr. Duncan raised his "constitutional issues."

The Court of Appeals applied the rules applicable to Rule 60 (B) Motions. The lead case in Ohio, *G.T.E. Automatic Electric v A.R.C. Industries* 47 O. St. 2d 146 (1976) requires that one attempting to set aside a judgment under Rule (60) B [essentially the same as Federal Rule 60 (b)] show: 1) The grounds for the relief sought are covered under Rule 60 (B) 1 through 5; 2) The relief is sought within one year and is otherwise timely; and, 3) A meritorious claim or defense to the complaint is shown. Appellant met none of those requirements. To be successful, under Rule 60 (B), Appellant must show all three.

On April 7, 1982 the Court of Appeals reversed the decision of the Common Pleas Court. In a portion of the Court's opinion the Court stated:

> "Careful review of the record before this court reveals that *defendant failed to introduce any evidence at the hearing on the motion that he has a meritorious defense*

or claim to present if the relief requested is granted. The assignments of error are well taken." (Emphasis added)

Thereafter, Mr. Duncan filed a Notice of Appeal and Memorandum in Support of Jurisdiction before the Supreme Court of Ohio.

By order of September 15, 1982 the Supreme Court of Ohio overruled Mr. Duncan's Memorandum in Support of Jurisdiction and found the existence of no substantial constitutional question. It is from the finding of the Supreme Court of Ohio that Mr. Duncan has filed a Notice of Appeal to the United States Supreme Court.

Appellee's issues, differ substantially from Appellant's issues. Appellee's issues are listed as follows:

1. Appellant has filed a Notice of Appeal to this Court when a Petition for Certiorari would have been the proper means of proceeding.

2. The finding which held the Ohio Pre-judgment attachment Statute to be unconstitutional occurred after the attachment and final judgment against Mr. Duncan and the finding is not retroactive.

3. The Appellant, himself, chose to rely upon Ohio Civil Rule 60 (B). Appellant cannot escape the consequences of his own act by raising "constitutional issues," not raised in the lower Courts and at the same time avoid the clear requirements of Rule 60 (B) practice.

Each argument will be dealt with in turn.

Appellant's arguments will not be directly answered, as they are not generally relevant to the issues and the allegations made by Appellant within those arguments are satisfactorily answered by Appellee's arguments.

ARGUMENT I

APPELLANT HAS FILED AN APPEAL TO THIS HONORABLE COURT RATHER THAN A PETITION IN SUPPORT OF A WRIT OF CERTIORARI AS REQUIRED.

Appellant has no right of appeal and Appellant's only means of bringing this matter to the Supreme Court of the United States would be through a Petition for Certiorari.

Rule 10.2, of the Rules of this Court, states in part, "The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the date of its entry, and *shall specify the statute or statutes under which the appeal to this court is taken."* (Emphasis added)

28 USC 2104 states:

"An appeal to the Supreme Court from a State Court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a Court of the United States."

Clearly, no statute or statutes have been set forth in Appellant's Notice of Appeal to the Supreme Court which would grant Appellant the right of direct appeal. Furthermore, Appellee's review of the statutes authorizing direct appeal would indicate that such direct appeal is not authorized and would not be proper.

ARGUMENT II

THE HOLDING OF OHIO REVISED CODE SECTION 2715 INVALID IS NOT RETROSPECTIVE SUCH THAT IT WOULD AFFECT PRE-JUDGMENT ATTACHMENTS WHICH WERE CARRIED OUT AND COMPLETED PRIOR TO THE DATE ON WHICH THE STATUTE WAS INVALIDATED.

Mr. Duncan has essentially argued that 1) The decision of this court in *Sniadach v. Family Finance Corporation* 395 U.S. 337 (1969) voided Ohio Revised Code Chapter 2715 at that time, because decisions of the United States Supreme Court are binding on all the states when decided; and 2) That even if the earlier decisions of the Supreme Court did not render the Ohio prejudgment attachment invalid, the decision in *Peebles* supra. in which the Ohio Supreme Court struck down the attachment statute, is retrospective in its application.

We will deal very rapidly with the first proposition. "Parties may rely on State statutes until such procedures are specifically overturned, even though a Supreme Court decision may have rendered their validity questionable." *Kacher v.*

Pittsburg National Bank 545 F. 2d 842 (3rd Circuit 1976)

With regard to the second issue, whether or not the holding in *Peebles* supra. should be prospective or retrospective, the Court is reminded that the attachment, the sheriff's sale and the default judgment were all complete prior to the decisions in *Peebles* supra.

Those Courts which have determined whether findings with regard to pre-judgment attachment statutes should be prospective or retrospective, have been uniform in finding that the decisions are prospective only.

The Court in *Kacher v. Pittsburg National Bank* 545 F. 2d 842 (3rd Circuit 1976) stated:

> "Giving *Fuentes'*[1] a retroactive effect is not only harsh and impracticable, but as Justice Clark . . . incisively stated, 'A retrospective application of *Fuentes v. Shevin,* supra., would work an injustice and a hardship upon [parties] who have lawfully acquired vested rights in the form of their state judgments.'"

Welsh v. Kinchla 577 F. 2d 767 (1st Cir., 1978) is identical with the fact situation in the instant matter, except that the property attached in *Welsh* was real estate. After the attachment in *Welsh* supra., the state law upon which the attachment was made was declared invalid.

The Court noted that "while the judgment *was prospective as to others,* it provided for relief to the immediate parties . . ." (Emphasis added) The Court went on to state:

> "In line with other decisions applying *Fuentes* to pretrial attachment statutes, *the court limited the effects of its judgment to parties before the court,* parties in *similar suits then pending,* and *attachments entered after the date* of its order . . ." (Emphasis added)

It would seem that the uniform opinion of the circuits, is that the attachment statutes which have been declared unconstitutional are not retrospective.

[1] 407 U.S. 67 (1972) this case is one of the lead cases decided by the Supreme Court overruling pre-judgment attachment statutes which give insufficient notice of attachment.

ARGUMENT III

A COURT HAS THE DESCRETION UNDER OHIO RULE 60 (B), TO EITHER SET ASIDE A DEFAULT JUDGMENT OR DISMISS A MOTION TO SET ASIDE BASED SOLELY UPON AFFIDAVITS AND DOCUMENTS ATTACHED TO THE MOTION. HOWEVER, ONCE THE COURT DETERMINES THAT A HEARING IS NECESSARY, THE MOVANT HAS THE BURDEN OF PUTTING FORWARD EVIDENCE AT THE HEARING, TO SHOW THAT THE MOVANT FITS WITHIN THE THREE REQUIREMENTS OF *GTE AUTOMATIC ELECTRIC v. ARC INDUSTRIES,* 47 O. St. 2d 146 (1976).

After having received memoranda and affidavits from both sides on Appellant's Motion to Set Aside, the court set this matter for hearing on May 5, 1981.

At that time Appellant's counsel argued the Motion to Set Aside, on behalf of Mr. Duncan, but called no witnesses and offered no evidence to the court.

Appellee indicated in open court that he had had witnesses ready, but did not call them in response to Appellant's failure to present any evidence.

The *only* matter before the court, supporting the Motion to Set Aside, is in Mr. Duncan's affidavit filed with the original Motion to Set Aside.

A movant is not automatically entitled to relief from a judgment or to a hearing. A movant must affirmatively show that he has a right to relief, or at the very least that he has the right to a hearing. *Adomeit v. Baltimore,* 39 O. App. 2d 97 (1974).

Bates and Springer, Inc. v. Stallworth 56 O. App. 2d 223, 382 N.E. 2d 1179 (8th Dist., 1978) sets forth the method for proceeding on 60 (B) motions. *Bates* supra. states that the court can 1) grant or 2) deny the motion, based upon the memos and filings or 3) it can hold a hearing. Once the Court decides that a hearing is necessary, the movant *must move forward with evidence presented at the hearing* to support the motion. Mr. Duncan failed to put forth any evidence at the hearing. Having chosen to proceed under Ohio Rule 60 (B), Mr. Duncan now wants to be excused from following the requirements in 60 (B) motions.

chosen to proceed under Ohio Rule 60 (B), Mr. Duncan now wants to be excused from following the requirements in 60 (B) motions.

The *Bates* Court stated:

> "If the trial court exercises its discretion and grants a hearing on the motion, any appeal taken from the courts action thereon is *not* decided upon the material submitted with the motion, but whether the *evidence introduced at the hearing* satisfies the three requirements of GTE." *Bates,* supra. at 228-229. (Emphasis added)

This requirement has been continued in a more recent case, *Mt. Olive Baptist Church v. Pipkins Paints,* 64 O. App. 2d 285 (1979), in which the court stated:

> "Where the trial court grants a hearing to determine the appropriateness of the motion, evidence *must* be introduced at the hearing to satisfy the three pronged test announced in *GTE Automatic Electric v. ARC Industries." Mt. Olive Baptist Church,* Supra. at 288. (Emphasis added)

The Court further said:

> "Once the evidentiary hearing is held, a *judgment* must be supported by evidence introduced at the hearing." *Mt. Olive Baptist Church,* supra. at 289. (Emphasis added)

In this cause, Duncan chose to present no evidence at the hearing.

The Court of Appeals followed *Bates and Springer, Inc.,* supra., and held that the movant had the burden of presenting evidence, if a hearing were held.

Further, it is clear that even Appellee's affidavit, the only "evidence" presented, failed to meet the three requirements of the *G.T.E.* supra. test.

Under Civ. R. 60 (B), Motions to Set Aside must be filed in a timely manner and if brought under 60 (B)(1), (2) or (3) the motion must be brought within one year from the date of the final entry.

Appellant's motion does not indicate upon which section of 60 (B) Appellant relying. However, it is clear from reading *Doddridge v. FitzPatrick,* 53 O.S. 2d 9 (1978) that a motion to

set aside under Rule 60 (B), for failure to receive service of summons and having no actual knowledge of the suit is a 60 (B)(1) motion.

If *Doddridge*, supra. is correct, the motion in this cause was also a 60 (B)(1) motion and had to have been brought within one year of the date of the final entry. Appellant's motion was not filed until July 3, 1980, more than one year after the date of the final entry and several months after Appellant admits he knew of the judgment.

Appellant therefore relied upon Rule 60 (B)(5).

> "Civ. R. 60 (B)(5) which allows relief for 'any other reason justifying relief from the judgment' is a catch-all provision, but it is *not* to be used as a substitute for Civ. R. 60 (B)(1), (2) or (3) when it is too late to seek relief under these provisions." *Adomeit v. Baltimore*, 39 O. App. 2d 97, 105 (1974). (Emphasis added)

Yet, that was exactly what Appellant attempted to do. As stated by Appellant's own counsel, in oral argument to the lower court:

> "We have pursued 60 (B)(5) because of the fact that our motion to set aside the default judgment was filed more than a year after the judgment was rendered; and for that reason we are proceeding under that catch-all provision this morning; . . ." (Tp.5) (Emphasis added)

Appellant proceeded under 60 (B)(5) simply because 60 (B)(1) was no longer available. "Although Civ. R. 60 (B)(5) is frequently referred to as the 'catch-all' provision, relief on this ground is to be granted only in extraordinary situations where the interest of justice calls for it." *Mt. Olive Baptist Church v. Pipkins Paints*, 64 O. App. 2d 285 (1979)

It must be remembered that Appellant did have knowledge of the action and judgment prior to the running of the one year time limit.

> "In the absence of any evidence explaining the delay, the movant has failed to demonstrate the timeliness of the motion." *Mt. Olive Baptist Church*, supra. at 289.

Clearly, the motion was neither filed within the required one year time limit, nor was it filed timely.

Even if testimony at a hearing were not required, the affidavit presented was not sufficient to meet Defendant's three prong test.

> "Vacation of such judgment, therefore, should not be granted lightly. The movant bears the burden of proving his allegation in support of this motion." *East Ohio Gas Company v. Walker*, 59 O. Ap. 2d 216 (1978).

Appellant neither met the *Bates and Springer, Inc.*, supra. requirements as to testimony, nor the three *G.T.E.* supra. requirements for setting aside the judgment.

CONCLUSION

For the within reasons, Appellant's Appeal should be dismissed as there is no substantial constitutional question and the issue was decided on an adequate non-Federal basis; as well as that this cause should not have been presented as an Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon Robert R. Ristaneo, 173 North Limestone Street, Lexington, Kentucky 40507 by regular U.S. Mail on this the 31st day of MARCH, 1982.

WILLIAM S. WYLER
Attorney for Plaintiff-Appellee

RULE 60. Relief from judgment or order
(A) . . .

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reason: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

APPENDIX-2

COURT OF COMMON PLEAS
CIVIL DIVISION
HAMILTON COUNTY, OHIO

Case No. A7809432

HAROLD PECK

Plaintiff

-vs.-

DUNCAN-GRAY MINING CO., et al

Defendants

MOTION TO (SIC) DEFENDANTS, JAMES E. DUNCAN AND EDWARD GRAY, TO SET ASIDE DEFAULT JUDGMENT

Now come Defendants, James E. Duncan and Edward Gray, and move the Court for an order, pursuant to Rule 60 (B), setting aside the default judgment entered against them and Duncan-Gray Mining Co., on May 29, 1979, in the amount of Twenty Thousand Dollars ($20,000.00), plus interest at the rate of six percent (6%) per annum from February 1, 1979 and costs. Defendants, James E. Duncan and Edward Gray, base this motion upon the following grounds:

1. Service of process was never perfected on any of the Defendants.

2. Because of the imperfection in the service of process, this Court never acquired jurisdiction to render a default judgment.

3. Because the Court did not have the prerequisite jurisdiction the default judgment is void.

4. This Court has the absolute inherent authority to set aside void judgments.

Respectfully submitted,

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/s/ Robert F. Ristaneo
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Telephone: (606) 252-5441

Attorneys for Defendant:
James E. Duncan and Edward Gray

MEMORANDUM IN SUPPORT OF DEFENDANTS, JAMES E. DUNCAN AND EDWARD GRAY, MOTION TO SET ASIDE DEFAULT JUDGMENT

STATEMENT OF FACTS

On October 25, 1978, a Complaint was filed in the court of Common Pleas, Hamilton County, Ohio, being case number A7809432, wherein the Plaintiff, Harold Peck, alleged that he was entitled to stock in the Duncan-Gray Mining Company, Inc., having a value of Twenty Thousand Dollars ($20,000.00), from the three (3) named Defendants, pursuant to the terms of an oral contract. The Clerk of Courts for Hamilton County, Ohio, was directed to issue summons and service of process by certified mail upon Duncan-Gray Mining Co., Second Floor, Citizens Plaza, Louisville, Kentucky 40202; James E. Duncan, 1025 Dove Run Rd., Lexington, Kentucky 40502; and, Edward Gray, Rural Route #2, Lexington, Kentucky 40505.

On or about November 1, 1978, the Sheriff of Hamilton County seized 11,401 shares of stock issued by Safetech of which Duncan-Gray Mining Company, Inc. was a subsidiary, belonging to James E. Duncan. These shares were being held by John J. Robinson for James E. Duncan, in Robinson's office in Cincinnati, Ohio.

Thereafter, the certified mail process sent to all three (3) Defendants was returned by the post office. Each piece was marked "Addressee Unknown." Subsequently, Plaintiff filed an affidavit alleging that the preferred method of service had failed and that it was necessary to proceed with service by publication. Service by publication was completed, no responsive pleadings were filed by any Defendants and a default judgment was entered in favor of Plaintiff. All three (3) Defendants finally became aware of the existence of the default judgment rendered against them in either April or May, 1980.

Defendants are now requesting that the default judgment be set aside. This motion is brought pursuant to Ohio Civil Rule 60 (B) and the basis of the Motion is that none of the Defendants had actual notice of the pendency of this action nor did they have actual knowledge of the pendency of the action. Defendants maintain that, at the time of the filing of the lawsuit,

Plaintiff possessed the actual knowledge or the ability to acquire the actual knowledge necessary to perfect service by certified mail on all three (3) of the Defendants, as is reflected in the affidavits of each Defendant which are attached to their respective Motions.

STATEMENT OF LAW

Rule 60 (B) of the Ohio Rules of Civil Procedure, is the basis of the within Motion of Defendants, James E. Duncan and Edward Gray. Rule 60 (B) provides a party with a means by which he may seek relief from a final judgment and provides, in part, that: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: *** (5) any other reason justifying relief from judgment. The motion shall be made within a reasonable time***."

Ohio Civil Rule 60 (B)(5) is based upon Federal Rule of Civil Procedure 60 (B)(6) and is intended as a catch-all provision. As noted in the staff notes relating to Rule 60 (B)(5), "The provision reflects the inherent power of a court to relieve a person from the unjust operation of a judgment." This concept was recognized in the third paragraph of the syllabus in *GTE Automatic Electric v. ARC Industries,* 47 O.S. 2d 146, 1 0.0. 3d 86, 351 N.E. 2d 113, (1976), wherein the Court held:

> "Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits."

The second paragraph of the syllabus in *GTE Automatic Electric v. ARC Industries, supra.,* sets forth three conditions which must be met in order for a party to prevail on a motion brought under Rule 60(B):

1. The party must have a meritorious defense to present if relief is granted.

2. The party must be entitled to relief under one of the grounds stated in Civ. R. 60(B) (1) through (5).

3. The motion must be made within a reasonable time.

The provisions of Rule 60(B) represent a balance between the legal principle that there should be finality in every case, so

that once a judgment is entered, it should not be disturbed, and the requirements of fairness and justice, that given the proper circumstances, some final judgments should be reopened. See *Adomeit v. Baltimore*, 39 O. App. 2d 97, 68 O.O. 2d 251 (1974).

With respect to the first requirement of *GTE Automatic Electric v. ARC Industries, Inc., supra.*, Defendants, James E. Duncan and Edward Gray, submit that they have several meritorious defenses to the instant lawsuit, including factual defenses and defenses challenging the jurisdiction of this Court. Additionally, the Complaint alleges that Plaintiff was to be compensated by receiving shares of stock for his services pursuant to an oral contract. Such an allegation gives rise to a meritorious defense based upon the Ohio Statute of Frauds. In support of Defendants' claim that they have a meritorious defense to present if relief from the default judgment is granted pursuant to this Motion, Defendants offer their affidavits attached hereto and made a part hereof. Additionally, Defendants offer the affidavit of Parker W. Duncan, attached hereto and made a part hereof. Defendants also refer the Court to the affidavit of John J. Robinson which is attached to the Motion of Defendant, Duncan-Gray Mining Company, Inc., to Set Aside Default Judgment and to the other official records of the proceedings contained in the case jacket of this action, maintained by the Clerk of Courts of Hamilton County, Ohio. Defendants, James E. Duncan and Edward Gray have attached hereto their proposed Answer, should the relief sought be granted.

With respect to the second requirement of *GTE Automatic Electric v. ARC Industries, supra,* Defendants, James E. Duncan and Edward Gray maintain that they are entitled to relief from the judgment under Civ. R. 60(B)(5). Referring, again, to the affidavits and the court record, it is obvious that none of the three Defendants named in the lawsuit received any actual notice of the lawsuit, nor did they have actual knowledge of the lawsuit. Defendants, James E. Duncan and Edward Gray, first became aware of the existence of this lawsuit and judgment in April, 1980. The affidavits submitted herein further demonstrate that the addresses of all three Defendants named in the lawsuit were either known by Plaintiff or through the exercise of reasonable diligence, could have been ascertained by Plaintiff.

With respect to the third requirement of *GTE Automatic Electric v. ARC Industries, supra,* Defendants, James E. Duncan and Edward Gray, submit that this Motion is made within a reasonable time after they first became aware of the existence of the instant lawsuit and judgment, as demonstrated by the affidavits attached hereto.

It is, therefore, respectfully submitted that the instant case is one of those situations where the requirements of fairness and justice are such that the final judgment rendered herein should be set aside pursuant to Rule 60 (B) and this case reinstated upon the Court's docket.

Respectfully submitted,

/s/ Wm. Stewart Mathews II
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/s/ Robert F. Ristaneo
504 Security Trust Building
Lexington, Kentucky 40507
Telephone: (606) 252-5441

Attorneys for Defendants,
James E. Duncan and Edward Gray

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to Robert A. Pitcairn, Jr., Katz, Teller, Brant and Hild, Attorneys for Plaintiff, 1632 Carew Tower, Cincinnati, Ohio 45202; William S. Wyler, French, Marks, Short, Weiner & Valleau, Attorneys for Plaintiff, 700 First National Bank Building, Cincinnati, Ohio 45202; and James M. Moore, Lindhorst & Dreidame, Attorneys for Defendant, Duncan-Gray Mining Co., Inc., 1200 American Building, Cincinnati, Ohio 45202, by regular U.S. Mail, this third day of July, 1980.

/s/ Wm. Stewart Mathews II
Attorney for Defendants
James E. Duncan and Edward Gray